JOHORE REPORT

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J. and HORNE, J.

December 23, 1937.

LIM TONG ..... Appellant.

vs.

THE PUBLIC PROSECUTOR,

JOHORE ..... Respondent.

[JOHORE CRIMINAL APPEAL No. 13 of 1937]

Criminal Law—Charge of Murder—Defence of Provocation—Onus of Proof—Section 106 of the Evidence Ordinance construed.

Where a person is charged with the offence of murder, the law in Johore, as regards the onus placed upon the prosecution, is the same as in England, and the principles laid down in *Rex* v. *Woolmington*, (1935) A.C. 462, should be applied.

The accused pleaded provocation and the learned trial Judge directed the assessors, *inter alia*, that if the accused alleged the exception of provocation, the burden lay on him to prove every requisite fact beyond reasonable doubt according to the same standard of proof as that required of the facts alleged by the prosecution. *Held*, on appeal, that although the burden of proving provocation is, by Section 106 of the Evidence Ordinance, put upon the accused, the onus of proving criminal intention lies upon the prosecution and never shifts. If the accused fails to discharge fully the burden of proving provocation, but by his evidence or arguments raises a reasonable doubt as to whether the prosecution has satisfied the assessors that such criminal intention as would justify a verdict of murder has been satisfactorily established, the accused is, therefore, entitled to the benefit of such doubt, and the offence would be reduced from murder to culpable homicide not amounting to murder, *Emperor* v. *Damapala*, (1937, A.I.R., Rangoon, p. 83) followed.

The Court of Appeal has power to dismiss an appeal notwithstanding a misdirection in law where no failure of justice has been occasioned by such misdirection.

APPEAL to the Court of Appeal from a conviction on a charge of murder. The trial was held at Muar before Mills J., sitting with two assessors, on the 14th November 1937.

The accused was convicted and appealed. The appeal was heard at Johore Bahru on the 13th December 1937 and dismissed, but as an important question of law had been raised, the following judgment was subsequently delivered.

On the hearing of the appeal the appellant appeared in person.

Abdul Hamid, Deputy Public Prosecutor, appeared on behalf of the State.

The judgment of the Court of Criminal Appeal (**TERRELL, AG. C.J. (S.S.) & HORNE, J.**) was as follows:—

There was ample evidence to justify the finding that the appellant inflicted the wound which resulted in the death of Lim Giap. The substantial defence was that the appellant was provoked by offensive expressions used by Lim Giap, and that he is entitled to rely on the First exception to section 300 of the Penal Code.

It appears that the appellant had an adopted brother Lim Peng who died 3 or 4 years ago. On or before Lim Peng's death Lim Giap seems to have disposed of all Lim Peng's property, and the appellant hearing about this made enquiries as to what had happened to the property, and in particular what the deceased had done with a sum of $200, the proceeds of sale of Lim Peng's daughter. Lim Giap said that he had sent it to Lim Hup Ser, Lim Peng's son in China, and that he had received letters acknowledging this sum. On the 3rd October appellant went to Lim Giap's house and asked to see the letters, but Lim Giap put him off and there was a quarrel. The appellant says that Lim Giap used abusive words to him and that he went out on the five-foot way feeling very angry. A few minutes later the appellant returned with a knife in his hand and stabbed Lim Giap. The appellant says that while he was on the five-foot way Lim Giap shouted further abuse at him, but this is not borne out by the evidence of Lim Giap's widow. According to the appellant's own story the matter of Lim Peng's affairs was discussed on two or three occasions previous to the 3rd October, and it was proved that on the 1st October the appellant went to a blacksmith and had a special knife made. It was with this knife that Lim Giap was stabbed. The appellant gave no explanation why he wanted this knife made to his special design, and the assessors were entitled to infer that the knife was obtained by the appellant for the purpose of attacking Lim Giap and that accordingly the killing was premeditated. If that was the correct inference, then it would appear that the appellant went to Lim Giap's house on the 3rd October in order to pick a quarrel, and the defence of provocation would fail, as it is specially provided:

> "That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person."

It is now necessary to consider the summary of his summing up made by the learned Judge in his report to the Appeal Court.

The learned Judge quite correctly directed the assessors that the onus was on the prosecution to prove each necessary fact, that the accused must be presumed to be innocent till convicted, and that he must be given the benefit of any reasonable doubt.

The facts which have to be proved to establish a case of murder are (1) that the accused was the person who struck the fatal blow, and (2) that the blow was struck with a criminal intention, as specified in section 300 of the Penal Code. The criminal intention, which in English law is termed "malice," is, as the learned Judge

said, a matter of inference to be drawn from all the circumstances of the case.

The law in Johore is as regards the onus placed upon the prosecution in cases of murder the same as in England and has been summarised by Lord Sankey in *Woolmington* vs. *Director of Public Prosecutions*, (1935) A.C., p. 462 in the following passage appearing at page 482.

> "When dealing with a murder case, the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (I) intentional and (II) unprovoked."

After dealing with the onus which lies on the prosecution the learned trial Judge then deals with the defence of provocation whereby the offence might be reduced from murder to culpable homicide not amounting to murder. The learned Judge proceeds:

> "If he alleges this exception, the burden lies on him to prove every requisite fact beyond reasonable doubt according to the same standard."

This Court cannot accept this direction as being a complete statement of the law on the subject. It is true that section 106 of the Evidence Ordinance places the onus of proving the statutory exceptions on the accused. Section 106 reads as follows:—

> "When a person is accused of any offence, the burden of providing the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Clearly it would be placing an impossible burden on the prosecution to prove a negative, i.e., that none of the statutory defences applied.

On the other hand, although the burden of proof is, by the section quoted, put upon the accused, he may very well by his defence raise a doubt as to whether the burden lying upon the prosecution has been completely discharged. The onus of proving the criminal intention lies on the prosecution and never shifts. Even, therefore, if the accused fails to discharge fully the burden of proving provocation, he may yet by his evidence or arguments raise a doubt as to whether the prosecution have satisfied the assessors that such criminal intention as would justify a verdict of murder, has been satisfactorily established. If there is a reasonable doubt, the accused should have the benefit of it.

The matter is put very clearly by Lord Sankey in *Woolmington's* case at page 482 in the following words:—

> "When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation, or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted."

It must be remembered that in the *Woolmington* case the defence was accident. When the defence is provocation, then, under similar circumstances, the offence would be reduced from murder to culpable homicide.

Putting this interpretation on section 106 of the Evidence Ordinance the Court feels no difficulty in applying the principles of *Woolmington's* case to trials for murder under the Penal Code. These principles have in fact been followed by Assize Judges both in the Colony and the F.M.S. The Court would refer to the decision of the Court of Criminal Appeal in Singapore in the case of *Rex* v. *Chui Yi*, 5 M.L.J., p. 177, where however the possible effect of evidence falling short of a full and complete discharge of the onus put on the accused by section 106 of the Evidence Ordinance was not considered in relation to the onus which always lies on the prosecution to prove their case.

The interpretation of section 106 of the Evidence Ordinance indicated above has the authority of a recent decision of the Full Bench in Rangoon (*Emperor* v. *U. Damapala* (1937) A.I.R., Rangoon, p. 83). The Court held that the decision in *Woolmington's* case was in no way inconsistent with the law in British India, and indeed, that the principles there laid down formed a valuable guide to the correct interpretation of section 105 (our section 106) of the Evidence Act.

The following passage may be quoted from the judgment of Roberts C.J. at p. 85:

> "When sufficient proof of the commission of a crime has been adduced, and the accused has been connected therewith as the guilty party, the burden of proof in the sense of introducing evidence in rebuttal of the case for the prosecution is laid upon him. If evidence is then adduced for the defence which leaves the Court in doubt as to whether the accused ought to be excused from criminal responsibility, or found guilty of a lesser offence than that with which he stands charged, then at the conclusion of all the

evidence it must still be remembered that it is incumbent upon the prosecution to have proved their case. Put shortly, the test is not whether the accused has proved beyond all reasonable doubt that he comes within any exception to the Indian Penal Code, but whether in setting up his defence he has established a reasonable doubt in the case for the prosecution, and has thereby earned his right to an acquittal."

In the present case the assessors were directed as regards the alleged provocation as follows:

"The accused alleges:

(1) When the deceased admitted swindling him, he was provoked but retained his self-control.

(2) When the deceased abused him in a vilely offensive manner he was much provoked but retained his self-control.

(3) When the deceased abused him a second time in a vilely offensive manner he was gravely and suddenly provoked and was deprived of the power of self-control."

In the opinion of this Court, this accurately summarises the appellant's evidence on the subject. The assessors must have found that the appellant was not deprived of the power of self-control, and that the offensive expression did not cause grave and sudden provocation, and in his report the learned trial Judge expresses his concurrence with such findings. Clearly, therefore, the appellant did not discharge the onus placed upon him by section 106 of the Evidence Ordinance. The Court is also of opinion that notwithstanding the learned Judge's failure to direct the assessors upon the point, the evidence adduced by the appellant could not have raised a reasonable doubt as to whether the prosecution had discharged the onus of proving criminal intention, and that accordingly there has been no failure of justice.

A question was raised whether the Court of Appeal has power to dismiss an appeal notwithstanding a misdirection in law, there being no section in the Courts Enactment corresponding to section 6(1) of the Court of Criminal Appeal Ordinance of the Colony. The point however seems to be covered by the provisions of the Criminal Procedure Code. Section 6 provides that the Courts for the administration of criminal justice shall be those constituted by the Courts Enactment or by any other law in force for the time being. The Court of Appeal is clearly a Court constituted by the Courts Enactment.

Then section 422 provides as follows:—

"Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account ..... of any misdirection in any charge to jurors or assessors unless such . . .misdirection has occasioned a failure of justice."

Apart therefore from section 6, it is a necessary inference that no question of reversing a finding on the ground of misdirection could be considered by any Court except the Court of Appeal, to which accordingly the provisions of section 422 must apply.

In the result therefore the appeal was dismissed and the conviction and sentence affirmed.

Appeal dismissed,
Conviction affirmed.